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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 DAN MORROW,

Civil No. 06-349-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 JO ANNE B. BARNHART,
Commissioner of Social Security,

14 Defendant.
15

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26 AIKEN, Judge:

27 Plaintiff, Dan Morrow, brings this action pursuant to the
28

1 Social Security Act, 42 U.S.C. § 405(g), to obtain judicial
2 review of a final decision of the Commissioner. The
3 Commissioner denied plaintiff's application for Disability
4 Insurance Benefits (DIB) under Title II of the Social Security
5 Act, and for Supplemental Security Income (SSI) disability
6 benefits under Title XVI. 42 U.S.C. §§ 416, 423. For the
7 reasons set forth below, the Commissioner's decision is
8 reversed and remanded for payment of benefits.

9 PROCEDURAL BACKGROUND

10 Plaintiff protectively filed his application for DIB and
11 SSI benefits on November 12, 2002. Tr. 63. He alleged
12 disability due to chronic back pain, shoulder and ankle
13 problems, and posttraumatic stress disorder (PTSD) commencing
14 on October 1, 2000. Tr. 15. His application was denied
15 initially and upon reconsideration. Tr. 26, 33. After a
16 hearing on January 24, 2005, the Administrative Law Judge (ALJ)
17 ruled that plaintiff was not disabled because plaintiff can
18 perform past relevant work as a routine office worker. Tr. 16.
19 The Appeals Council denied plaintiff's request for review
20 making the ALJ's decision the final agency decision. Tr. 6;
21 See 20 C.F.R. §§ 404.981, 416.1481.

22 STATEMENT OF THE FACTS

23 Plaintiff was 56 years old at the alleged onset date of
24 his disability, and 60 years old at the time of the ALJ
25 hearing. Tr. 16. Plaintiff graduated from high school in Long
26 Creek, Oregon, and immediately thereafter served four years in
27 the United States Marine Corps as a mechanic and aerial gunner
28 on a helicopter. Tr. 160. From 1968 until 2000, plaintiff was

1 employed as a truck driver based out of Portland. Id.
2 Plaintiff injured his back and shoulder in 1996. He was
3 planning to retire in 1997, so his employer assigned him to
4 light duty clerical assignments in the dispatching office until
5 1997. Tr. 160, 555. Because plaintiff and his wife needed
6 more income, plaintiff returned to work with his former
7 trucking employer during 1999 and 2000. Tr. 557. Knowing
8 plaintiff's medical history, plaintiff's employer arranged for
9 plaintiff to drive the truck and drop the trailer, without
10 unloading the trailer. Tr. 557. Plaintiff, however, had to
11 ultimately stop working because sitting for extended periods of
12 time aggravated his back condition. Id. In 2003, plaintiff
13 and his wife moved from Portland to the small community of Long
14 Creek, Oregon, for relief from the crowds of the city which
15 decreased plaintiff's PTSD symptoms. Tr. 162, 572.

16 Plaintiff's medical history is set out in detail by the
17 ALJ. Tr. 16-22. This court accepts the ALJ's recitation of
18 plaintiff's medical history.

19 STANDARD OF REVIEW

20 This court must affirm the Secretary's decision if it is
21 based on proper legal standards and the findings are supported
22 by substantial evidence in the record. Hammock v. Bowen, 879
23 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more
24 than a mere scintilla. It means such relevant evidence as a
25 reasonable mind might accept as adequate to support a
26 conclusion." Richardson v. Perales, 402 U.S. 389, 401
27 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S.
28 197, 229 (1938)). The court must weigh "both the evidence that

1 supports and detracts from the Secretary's conclusions."
2 Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

3 The initial burden of proof rests upon the claimant to
4 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
5 (9th Cir. 1986). To meet this burden, plaintiff must
6 demonstrate an "inability to engage in any substantial gainful
7 activity by reason of any medically determinable physical or
8 mental impairment which can be expected . . . to last for a
9 continuous period of not less than 12 months. . . ." 42 U.S.C.
10 § 423(d)(1)(A).

11 The Secretary has established a five-step sequential
12 process for determining whether a person is disabled. Bowen v.
13 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
14 416.920. First the Secretary determines whether a claimant is
15 engaged in "substantial gainful activity." If so, the claimant
16 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
17 §§ 404.1520(b), 416.920(b).

18 In step two the Secretary determines whether the claimant
19 has a "medically severe impairment or combination of
20 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
21 §§ 404.1520(c), 416.920(c). If not, the claimant is not
22 disabled.

23 In step three the Secretary determines whether the
24 impairment meets or equals "one of a number of listed
25 impairments that the Secretary acknowledges are so severe as to
26 preclude substantial gainful activity." Id.; see 20 C.F.R.
27 §§ 404.1520(d), 416.920(d). If so, the claimant is
28 conclusively presumed disabled; if not, the Secretary proceeds

1 to step four. Yuckert, 482 U.S. at 141.

2 In step four the Secretary determines whether the
3 claimant can still perform "past relevant work." 20 C.F.R.
4 §§ 404.1520(e), 416.920(e). If the claimant can work, he is
5 not disabled. If he cannot perform past relevant work, the
6 burden shifts to the Secretary. In step five, the Secretary
7 must establish that the claimant can perform other work.
8 Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) &
9 (f), 416.920(e) & (f). If the Secretary meets this burden and
10 proves that the claimant is able to perform other work which
11 exists in the national economy, he is not disabled. 20 C.F.R.
12 §§ 404.1566, 416.966.

13 DISCUSSION

14 Following the five-step sequential analysis, the ALJ
15 found at step one that plaintiff has not engaged in
16 "substantial gainful activity" since his alleged onset of
17 disability. Tr. 22. At step two, the ALJ found that plaintiff
18 had the following "severe impairments:" degenerative disc
19 disease at C6-C7; mild degenerative disc space narrowing at L3-
20 L4; hyperesthesia and paresthesia in the upper extremities
21 associated with elevating or extending the upper extremities
22 above shoulder level; ankle pain caused by episodic arthritis
23 and gout; recurrence of PTSD and depressed mood, secondary to
24 alcohol dependence; and alcohol dependence/abuse. Id. At step
25 three, the ALJ found that plaintiff's impairments did not meet
26 or equal the requirements of a listed impairment. Id.

27 The ALJ next determined that plaintiff had a residual
28 functional capacity (RFC) to perform light exertion work in

1 that he can stand and/or walk a total of 6 hours in an 8-hour
2 workday, and he can sit a total of 6 hours in an 8-hour
3 workday. Tr. 23. The ALJ limited plaintiff to work that
4 involves occasional use of ladders, ropes and scaffolds and no
5 more than occasional stooping and crawling. Id. Finally, the
6 ALJ limited plaintiff's reach in all directions, including
7 overhead. Id. Plaintiff disputes the accuracy of this RFC.

8 At step four, the ALJ found that plaintiff was able to
9 perform his past relevant work as a routine office clerk
10 because this work did not require the performance of activities
11 precluded by his RFC. Tr. 23. See 20 C.F.R. § 404.1565.

12 In sum, plaintiff objects to the ALJ's: (1) exclusion of
13 relevant evidence in formulating plaintiff's RFC; and (2)
14 conclusion that plaintiff can perform the work of a routine
15 office clerk. In particular, plaintiff argues that the ALJ
16 improperly discounted (1) treating physician Dr. Lee's
17 assessment of plaintiff; (2) plaintiff's pain testimony; (3)
18 the third-party questionnaire prepared by plaintiff's wife; and
19 (4) failed to discuss all of plaintiff's "severe impairments"
20 in formulating the RFC by excluding plaintiff's arthritis,
21 gout, ankle pain, and PTSD.

22 Consequently, plaintiff argues, if the evidence had been
23 properly considered, the ALJ would have formulated a different
24 RFC and would not have found that plaintiff could return to
25 past relevant work as a routine office worker. Plaintiff
26 relies on the vocational expert's testimony that two medically
27 related work absences per month would render plaintiff not
28 employable. Plaintiff argues Dr. Lee assessed plaintiff's

1 absenteeism at that rate. Therefore, plaintiff asserts this
2 court must find plaintiff disabled and remand for an award of
3 benefits.

4 A. Claimant's Credibility

5 Plaintiff argues that the ALJ erred in finding
6 plaintiff's testimony not credible. The ALJ found plaintiff
7 not credible because (1) the medical record did not support
8 plaintiff's allegations that he is unable to perform basic work
9 activities due to limitations resulting from his "severe
10 impairments;" (2) plaintiff's current daily activities are
11 inconsistent with his alleged level of limitations; and (3)
12 plaintiff has provided inconsistent information regarding his
13 activities. Tr. 20.

14 In rejecting a plaintiff's testimony, the ALJ must
15 perform a two-stage analysis. Smolen v. Chater, 80 F.3d 1273,
16 1281 (9th Cir. 1996). First, a plaintiff must produce
17 objective medical evidence of an underlying impairment which
18 could reasonably be expected to produce the pain or other
19 symptoms alleged. There must be no evidence of malingering.
20 Here, plaintiff has produced objective evidence of an
21 impairment that could produce symptoms resulting in the
22 limitations articulated by the treating physician, Dr. Lee.
23 Further, the ALJ found no evidence of malingering. Therefore,
24 the analysis moves to the second stage.

25 Pursuant to the second stage of the analysis, the ALJ
26 must consider the credibility of plaintiff's testimony
27 regarding the severity of his symptoms. The ALJ must provide
28 clear and convincing reasons for discrediting plaintiff's

1 testimony regarding the severity of his symptoms. Dodrill v.
2 Shalala, 12 F.3d 915, 918 (9th Cir. 1993). The ALJ must make
3 findings that are "sufficiently specific to permit the
4 reviewing court to conclude that the ALJ did not arbitrarily
5 discredit the claimant's testimony." Orteza v. Shalala, 50
6 F.3d 748, 750 (9th Cir. 1995).

7 To determine credibility, the ALJ may consider objective
8 medical evidence and the plaintiff's treatment history.
9 Smolen, 80 F.3d at 1284. The ALJ may also consider the
10 plaintiff's daily activities, work record, and observations of
11 physicians and third parties with personal knowledge about the
12 plaintiff's functional limitations. Id. In addition, the ALJ
13 may employ ordinary techniques of credibility evaluation such
14 as prior inconsistent statements concerning symptoms, and
15 statements made by the plaintiff that appear to be less than
16 candid. Id. 20 C.F.R. § 404.1529; SSR 96-7p.

17 Here, the ALJ found that the medical record does not
18 support plaintiff's allegations that he is unable to perform
19 basic work activities due to his impairments because "claimant
20 reported to Dr. Lee on July 16, 2004, [that]...he had generally
21 good consequences of all [the] interventions." Tr. 20. I
22 disagree and find this citation taken out-of-context by the ALJ
23 to support the contention that the medical evidence does not
24 support plaintiff's limitations. In fact, on July 16, 2004,
25 Dr. Lee sent plaintiff a letter that read in its entirety:

26 Dear Mr. Morrow,
27 The results of your recent x-rays are normal. The chest
28 x-ray we got on your last visit was considered normal.
That is good news, and I thought you would like to know.
I hope your summer is going well.

1 Sincerely,
2 /s/ David K. Lee, MD.

3 Tr. 496-97.

4 The referenced x-rays in the letter were performed as a follow
5 up to plaintiff's mild stroke on November 3, 2003. Tr. 444.

6 The remainder of Tr. 497 begins a mental status exam and
7 clinical interview of plaintiff at the Boise Veterans
8 Administration Hospital for PTSD by Richard T. Sonnenberg, PhD,
9 on July 8, 2004. Tr. 497-499. Dr. Sonnenberg begins his
10 dictation of the clinical interview as follows: "The Veteran
11 reported that he is presently being treated for hypertension,
12 high cholesterol, and chronic back pain at this facility. *He*
13 *reports generally good consequences of those interventions.*"
14 Tr. 498 (emphasis added). The dictation of the clinical
15 interview continues with paragraphs discussing recent legal
16 issues, the nature of plaintiff's home surroundings and
17 hobbies, the circumstances that bring forth plaintiff's Vietnam
18 memories, and plaintiff's alcohol dependency issues. Tr. 498-
19 99.

20 I find that plaintiff's statement that he has "generally
21 good consequences of [his doctors'] interventions" is cursory
22 and unilluminating as to the actual nature of plaintiff's
23 physical impairments. The statement at issue was made in a
24 mental health exam interview to a psychologist who was probing
25 plaintiff for an overall picture of his life. Dr. Sonnenberg
26 also reported that plaintiff "made poor eye contact...over the
27 course of our time together" and that plaintiff's attitude
28 toward the evaluation, and to life in general, was "anxious,

1 yet forthcoming." Tr. 497. I find that such an assessment
2 highlights plaintiff's discomfort and further minimizes the
3 significance of the statement at issue. As such, it was
4 inappropriate for the ALJ to rely on this statement to discount
5 the entire medical record as not in accord with plaintiff's
6 subjective complaints.

7 The ALJ further found that "the record includes evidence
8 strongly suggesting that the claimant has exaggerated symptoms
9 and limitations," because examining Dr. Grunwald "reported that
10 the claimant appeared to be hyperresponsive." Tr. 20. I
11 disagree with the ALJ's characterization that Dr. Grunwald's
12 "hyperresponsivity" notation alone "strongly suggests" that
13 plaintiff has exaggerated symptoms and limitations. I conclude
14 that the medical evidence supports plaintiff's allegations that
15 he is unable to perform basic work activities due to his severe
16 impairments.

17 The ALJ's second reason for finding plaintiff not
18 credible is that plaintiff's "current daily activities are
19 inconsistent with his alleged level of limitations" because
20 "the record reflects a number of activities after the alleged
21 disability onset date, which does indicate the claimant's daily
22 activities have...been greater than the claimant has generally
23 reported." Tr. 20.

24 As support for this finding, the ALJ first cited the fact
25 that "claimant reported he used to walk 4-5 miles per day until
26 his ankles went out." Id. Plaintiff's actual report was that
27 he "used to walk 4-5 mi/day - stop/rest/stop/rest - until
28 ankles went out." Tr. 403. I find that this statement by

1 itself does not support the ALJ's finding that plaintiff's
2 current daily activities are inconsistent with his alleged
3 level of limitations.

4 The ALJ's next citation is to a report by Dr. Lee on July
5 16, 2004, that plaintiff "spends a good deal of his time
6 fishing, hunting, and doing shop work." Tr. 20. As noted
7 previously, this statement was not made by Dr. Lee, rather it
8 was part of a summary of a mental health interview by the VA
9 psychologist, Dr. Sonnenberg, on July 8, 2004. Tr. 498. As
10 discussed previously, this statement was made in the context of
11 a mental health clinical interview to determine whether
12 plaintiff has PTSD, and the statement's generality does not
13 help quantify the specific relationship between plaintiff's
14 activities and his alleged level of limitation.

15 The ALJ next cites plaintiff's "treatment notes in August
16 and September of 2004 [that] reveal the claimant prepared a
17 follow-up leisure plan for alcohol dependence recovery, which
18 included activities such as gardening, canning, walks, hunting,
19 fishing, woodworking, building a shed and fish pond, and
20 following through with walking program." Tr. 20. Again, these
21 notes were made by Recreational Substance Abuse Therapy (RSAT)
22 therapists while plaintiff was completing an alcohol counseling
23 program. On August 26, 2004, the RSAT care manager noted that
24 "Vet was having difficulty planning activities. Informed vet
25 of importance of learning how to stay busy to avoid boredom and
26 potential relapse." Tr. 476. On September 7, 2004, the
27 Recreation Therapist noted that plaintiff "has been involved
28 with Recreation Therapy 3-4 x per week for 1-4 hour sessions

1 while in RSAT....He has completed the required craft project.
2 He completed his art expression and is scheduled to share the
3 meaning with the therapeutic community prior to graduation this
4 pm. He has written a follow-up plan for leisure in recovery
5 which includes: gardening and canning; walks; hunt and fish; no
6 social activities; woodworking; may watch football games.
7 [Plaintiff's] leisure goals include: build a shed and fish
8 pond; stay active with current leisure activities only do them
9 sober; follow through with walking program." Tr. 472.

10 I disagree with the ALJ's characterization that these
11 statements made during alcohol counseling are inconsistent with
12 plaintiff's alleged limitation level. Throughout the multi-
13 week program, recreation therapists had been encouraging the
14 participants to design aspirational goals that assist them in
15 abstaining from alcohol. Writing a follow-up plan that
16 includes "gardening, canning, walks, hunting, fishing, and
17 woodworking" does not contradict plaintiff's alleged severe
18 impairments - chronic back pain, shoulder and ankle pain, and
19 PTSD. Further, the third-party questionnaire completed by
20 plaintiff's wife explained that plaintiff "does a few hours of
21 woodcraft" during the day, "in the summer he fishes for a few
22 hours every other day, and once a year he goes hunting." Tr.
23 96. Again, I find that when the aspirational post-recovery
24 leisure plan is viewed in the broader context of plaintiff's
25 life, such hopes and goals do not contradict the limitations
26 caused by plaintiff's medically supported severe impairments.

27 The ALJ next observes that "the medical records reveal on
28 October 18, 2004, [plaintiff] reported he built a meat room and

1 a greenhouse, in the last three months." Tr. 20. In response
2 to the recreation therapist's questionnaire which asked for
3 leisure activities within the last 3 months, plaintiff
4 responded "spend time with granddaughter, working on building a
5 meat room, and build a greenhouse." Tr. 482. At the hearing,
6 the ALJ asked plaintiff to explain this comment about his
7 recent activities, including building a meat room and a
8 greenhouse. Tr. 561. Plaintiff explained that "my sons were
9 doing the work and I was basically overseeing it. They would
10 do all the heavy lifting and the working, and I would basically
11 just tell them how to do it and what to do." Tr. 561. As to
12 the greenhouse, which was indicated as a future goal in
13 plaintiff's recreational therapy follow-up plan, plaintiff
14 explained that "hopefully my son would help me. I mean that's
15 just stuff that's got to be done around the house, you know, in
16 the future that when they come over, they can help me with."
17 Tr. 562. Given plaintiff's explanation of the nature of his
18 involvement in the building of a greenhouse and meat room, I
19 again disagree with the ALJ that plaintiff's statements to the
20 recreation therapist contradict his alleged level of
21 limitation.

22 Finally, the ALJ cites as support for plaintiff's
23 "inconsistencies" that "medical records also reveal the
24 claimant had obligations to rewire a mountain cabin to bring it
25 up to code." Tr. 20. In the course of arranging a time when
26 plaintiff could take part in the RSAT program, Dr. Dewey noted
27 that plaintiff "had obligations. He needs to pick up his wife
28 in Portland. He needs to rewire a mountain cabin that he owns

1 and bring it up to code according to the order of the county."
2 Tr. 496. I do not find this fact significant because it is
3 unclear whether plaintiff himself intends to rewire the cabin,
4 or whether he will employ help from his sons or others. At the
5 hearing, the ALJ did not inquire further into the nature of
6 this obligation. Even if plaintiff is planning to rewire the
7 cabin himself, it is not clear that such a project indicates
8 plaintiff's alleged limitations are inconsistent with such an
9 activity.

10 The ALJ's final reason for rejecting plaintiff's
11 testimony is that "regarding his activities, [plaintiff] has
12 provided inconsistent information." Tr. 20. The ALJ states
13 that "at the hearing, [plaintiff] denied performing
14 construction activities, which is contrary to the numerous
15 notes throughout the medical record." Id. All of plaintiff's
16 alleged construction activities were discussed above, i.e.
17 greenhouse, meat house, future fish pond and shed, and future
18 cabin rewiring. Plaintiff explained that he had help
19 completing several of the projects, and intended to get help to
20 finish the others. I find the ALJ's reasoning to be a
21 repetition of the prior argument, which I have addressed.
22 Plaintiff's explanations for his activities indicate that his
23 level of limitation is in fact consistent with his current
24 daily activities.

25 An ALJ may reject a claimant's testimony if the claimant
26 is able to spend a substantial part of the day performing
27 household chores or other activities that are transferable to a
28 work setting. The Act, however, does not require that

1 plaintiff be incapacitated to be eligible for benefits, and
2 "many home activities may not be easily transferable to a work
3 environment where it might be impossible to rest periodically
4 or take medication." Smolen, 80 F.3d at 1284.

5 Thus, I find that the ALJ failed to provide adequate
6 reasons for rejecting plaintiff's subjective testimony.

7 B. Medical Evidence

8 Plaintiff objects to the ALJ's use of the nonexamining
9 physician's assessment of plaintiff over the limitations
10 assessed by the treating physician in formulating plaintiff's
11 RFC.

12 An ALJ considers three types of medical opinions -
13 treating, examining, and nonexamining - in determining the
14 nature of a claimant's disability, and accords each a different
15 weight. See Lester v. Chater, 81 F.3d 821, 830-31 (9th Cir.
16 1996). Medical opinions and conclusions of treating physicians
17 are accorded special weight because these physicians are in a
18 unique position to know claimants as individuals, and because
19 the continuity of their dealings with a claimant enhances their
20 ability to assess the claimant's problems. See Winans v.
21 Bowen, 853 F.2d 643, 647 (9th Cir. 1987).

22 A treating physician's medical opinion as to the nature
23 and severity of an individual's impairment must be given
24 controlling weight if that opinion is well-supported and not
25 inconsistent with the other substantial evidence in the case
26 record. Edlund v. Massanari, 253 F.3d 1152, 1157 (9th Cir.
27 2001); see also 20 C.F.R. § 404.1527(d)(2). Even when the
28 treating physician's opinion is contradicted by the opinion of

1 a non-treating physician, the treating physician's opinion "can
2 only be rejected for specific and legitimate reasons that are
3 supported by substantial evidence in the record." Lester, 81
4 F.3d at 830-31. The opinion of a nonexamining physician cannot
5 by itself constitute substantial evidence that justifies the
6 rejection of the opinion of a treating physician. Id. at 831.

7 Here, the nonexamining physician's RFC-related assessment
8 contradicts the treating physician's assessment. As such, this
9 court will review the ALJ's rejection of the treating
10 physician's assessment for "specific and legitimate reasons
11 that are supported by substantial evidence in the record." Id.
12 at 830-31. The treating and nonexamining physicians' RFC-
13 related assessments of plaintiff are excerpted below.

14 Treating physician Dr. Lee:

15 Plaintiff can perform sedentary work and light work, with
16 considerable pain, but not medium work, even if he can
17 alternate between sitting and standing during the work
18 day. Plaintiff can stand/walk for 20 minutes at a time
19 for a total of 3 hours a day. Plaintiff can
20 handle/finger for 20 minutes at a time for a total of 5
21 hours a day. There is no evidence of malingering. Due
22 to the severity of plaintiff's impairments, he would be
23 unable to complete two work days a month at the light or
24 sedentary levels of exertion. Tr. 528-30.

25 Nonexamining physician:

26 Plaintiff can frequently lift and/or carry 25 pounds, and
27 occasionally lift and/or carry 50 pounds. He can stand
28 and/or walk with normal breaks about 6 hours in an 8-hour
work day. Plaintiff can sit with normal breaks about 6
hours in an 8-hour work day. He is limited in reaching
all directions, he can occasionally use ladders, ropes,
and scaffolds, and he can occasionally stoop or crawl.
Tr. 414-418.

Plaintiff first objects to the ALJ's rejection of Dr.
Lee's opinion as the treating physician. The ALJ found that

1 Dr. Lee's opinion, as communicated through the Social Security
2 Administration's "check-the-box" form, is not supported by
3 objective evidence or other medical evidence of record, and
4 thus cannot be given controlling weight. Tr. 21. Plaintiff
5 argues that if Dr. Lee's assessment were utilized, the RFC
6 would reflect that plaintiff would not be employable.

7 In reviewing the record, I find the ALJ's broad
8 conclusion that Dr. Lee's opinion is "not supported by
9 objective evidence or any other medical evidence" does not rise
10 to the necessary standard of "specific and legitimate reasons"
11 for discounting a treating physician's testimony. Dr. Lee did,
12 in fact, complete a "check-the-box" form, but the court notes
13 that such a form is the required "Medical Source Statement" for
14 consideration of disability benefits. While it takes the form
15 of "check-the-box," the data contained therein is a culmination
16 and summary of the entire treating relationship between Dr. Lee
17 and plaintiff.

18 Dr. Lee first examined plaintiff on April 28, 2003 for
19 back pain, arthritis in the ankles, hypertension, carpal tunnel
20 syndrome, and PTSD. Tr. 436. Dr. Lee noted that plaintiff's
21 back pain gets "good relief from Vicodin [and he] may go
22 several days without any; [but] then he will need two or rarely
23 three a day." Id. The next appointment with Dr. Lee occurred
24 on September 17, 2003. Tr. 442. Dr. Lee reported that
25 plaintiff's back problems are "still his most active problem.
26 He does not do badly if he does not do anything, but any
27 exertion or sustained sitting will cause pain." Id. Dr. Lee
28 also reported that with treatment, plaintiff's shoulder and

1 wrist pain had improved. Id. Significantly, after treating
2 plaintiff again on November 10, 2003, Dr. Lee reported that
3 plaintiff's "back pain continues to give him pain. To the best
4 of my medical opinion, his back discomfort would be disabling
5 from any significant truck driving." Tr. 447. Dr. Lee also
6 reported that plaintiff "still gets pain in both wrists, right
7 greater than left." Id. On February 25, 2004, Dr. Lee noted
8 that plaintiff's back pain and carpal tunnel pain continued,
9 and thus treatment with ibuprofen and Vicodin should continue.
10 Tr. 454. On June 28, 2004, Dr. Lee reported that plaintiff was
11 still suffering from "gouty arthritis" but that it "responds
12 well to [the medication] indocin." Tr. 499. Dr. Lee further
13 reported that plaintiff's PTSD Screen was positive, and the
14 PTSD psychologist and Dr. Lee would coordinate visits because
15 plaintiff lives so far away from the Veterans Administration
16 Hospital. Id. Finally, Dr. Lee completed the social security
17 medical source statement on November 17, 2004. Tr. 528.

18 Despite the ALJ's assertions that Dr. Lee's opinion is
19 not supported by the objective medical evidence, I note that
20 the record is replete with objective medical evidence related
21 to plaintiff's severe impairments. On April 21, 1997, x-rays
22 revealed osteoarthritis in plaintiff's thoracic and lumbar
23 spine, tr. 197, 202, and on July 17, 1997, an MRI revealed mild
24 degenerative disc disease at C6-C7. Tr. 197, 409. The MRI
25 further revealed that plaintiff has mild levoscoliosis of the
26 mid-lumbar spine, and subtle scoliosis with convexity to the
27 left in the mid-lumbar region. Id. In 1998, plaintiff was
28 diagnosed with tendinitis of the right shoulder and

1 osteoarthritis of the left shoulder. Tr. 185, 189, 376. In
2 2000, plaintiff underwent repair of a full thickness tear of a
3 tendon in his left shoulder. Tr. 213, 350, 371. On March 3,
4 2003, plaintiff's back x-rays showed subtle scoliosis with
5 convexity to the left in the mid-lumbar area, mild osteophytes
6 at L2-L3, L3-L4, and disc spaces that appeared to be preserved.
7 Tr. 243-45. On April 16, 2003, nerve conduction studies and
8 EMG testing found plaintiff had mild bilateral median
9 neuropathy of the wrist, resulting in carpal tunnel syndrome or
10 thoracic outlet syndrome. Tr. 436. On November 3, 2003,
11 plaintiff was assessed with having had a mild stroke, or
12 temporary ischemic attack (TIA). Tr. 444. On July 8, 2004,
13 plaintiff was given a psychiatric evaluation by Richard T.
14 Sonnenberg, Ph.D., who considered plaintiff 50% disabled due to
15 PTSD. Tr. 497.

16 Despite the abundance of objective medical evidence in
17 the record, the ALJ explained that Dr. Lee "apparently relied
18 quite heavily on the subjective report of symptoms and
19 limitations provided by plaintiff, and seemed to uncritically
20 accept as true most, if not all, of what the claimant
21 reported." Tr. 21. I disagree. As noted above, the medical
22 record is replete with evidence that is consistent with the
23 limitations noted by Dr. Lee. An ALJ has a special duty to
24 fully and fairly develop the record; if the ALJ thought he
25 needed to know the basis of a treating doctor's opinions in
26 order to evaluate them, he had a duty to conduct an appropriate
27 inquiry. See 20 C.F.R. § 404.1527(c)(3); Smolen v. Chater, 80
28 F.3d 1273 (9th Cir. 1996). In light of the medical evidence

1 presented in this record, the ALJ had a duty to identify
2 specific and legitimate reasons as to why he rejected Dr. Lee's
3 assessment. The ALJ failed to do so.

4 Moreover, the opinion of the treating physician is
5 further buttressed by the conclusion of the Oregon Vocational
6 Rehabilitation Division, which stated that "based on medical
7 and psychological records, I believe that even a sedentary
8 position would not be advisable" for plaintiff. Tr. 540.

9 In conclusion, I find that the ALJ failed to give
10 specific and legitimate reasons for rejecting the treating
11 physician's assessment. The ALJ rejected Dr. Lee's assessment
12 because it was a "check-the-box" form that "seemed" to rely on
13 plaintiff's subjective complaints. The ALJ failed to note
14 however, that plaintiff had numerous visits with Dr. Lee for
15 over a year before Dr. Lee completed the Social Security
16 Administration's check-the-box form. In addition, the record
17 contains objective medical evidence supporting Dr. Lee's
18 assessment of plaintiff, including x-rays, surgeries, emergency
19 room visits, and psychological evaluations.

20 C. Vocational Expert Testimony

21 The ALJ relied on the testimony of a vocational expert in
22 finding that the plaintiff could perform light work as a
23 routine office worker. Tr. 583. However, the hypothetical
24 presented to the vocational expert by the ALJ was incomplete
25 because it did not include plaintiff's relevant symptoms and
26 treating physician Dr. Lee's assessment. At the hearing,
27 plaintiff's attorney specifically asked the vocational expert
28 to assess plaintiff's employability if Dr. Lee's opinion that

1 plaintiff would have two medically-related work absences per
2 month were included in the RFC. The vocational expert
3 testified that plaintiff would be considered not employable.
4 Tr. 584-85. Thus, because I find that treating physician Dr.
5 Lee's assessment should not have been discounted, plaintiff is
6 considered not employable at step five, and therefore
7 disabled.¹

8 The question remains whether these errors require
9 reversal or remand for further consideration. "The decision
10 whether to remand a case for additional evidence or simply to
11 award benefits is within the discretion of the court." Sprague
12 v. Bowen, 812 F.2d 1226, 1232 (9th Cir. 1987). Remand is
13 appropriate where further proceedings would resolve defects in
14 the administrative proceedings. However, where new proceedings
15 would simply serve to delay the receipt of benefits and would
16 not add to the existing findings, an award of benefits is
17 appropriate. McAllister v. Sullivan, 888 F.2d 599, 603 (9th
18 Cir. 1989). Here, given plaintiff's undisputed testimony, the
19 medical reports on record including Dr. Lee's assessment, and
20 the hypothetical presented by plaintiff's attorney to the
21 vocational expert, the record is complete and benefits are
22 therefore awarded to plaintiff.

23 CONCLUSION

24 The Commissioner's decision is not supported by
25 substantial evidence, and is therefore reversed and remanded
26

27 ¹ Because I find plaintiff disabled when properly considering the
28 opinion of his treating physician, I will not consider
plaintiff's remaining allegations of error.

1 for payment of benefits.

2 IT IS SO ORDERED.

3 Dated this 23 day of March 2007.

4
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6 

7
8 Ann Aiken
United States District Judge